UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOLARCITY CORP.

and Case 32-CA-128085

ANITA BETH IRVING

NOTICE TO SHOW CAUSE[1]

On December 22, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the Act by: (1) maintaining and enforcing arbitration agreements that required employees, as a condition of employment, to waive their right to file class or collective actions in all forums; and (2) maintaining arbitration agreements that interfered with employees' ability to access the Board. 363 NLRB No. 83 (2015). On August 15, 2018, the United States Court of Appeals for the Fifth Circuit denied enforcement, in light of *Epic Systems Corp. v. Lewis*, 585 U.S. ___, 138 S. Ct. 1612 (2018), of the Board's first finding, and remanded the second finding back to the Board.

At the time of the Board's decision, and Administrative Law Judge Kenneth W. Chu's March 31, 2015 decision that the Board affirmed, the issue whether maintenance of a policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) on the basis that employees would reasonably believe it did would be resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that

[1] Chairman Ring, who is recused, is a member of the panel but took no part in the consideration of this case on the merits. In *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum of a panel when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 560 U.S. at 688; see also *Correctional Medical Services, Inc.*, 356 NLRB 277, 277 fn. 1 (2010).

held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." Id. at 647. The Board subsequently overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Accordingly, the Board hereby issues the following notice to show cause why this case should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.[2]

NOTICE IS GIVEN that any party seeking to show cause why this case should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before April 10, 2020 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., March 27, 2020.

By direction of the Board:

Roxanne L. Rothschild

Executive Secretary

[2] See generally *Prime Healthcare Paradise Valley, LLC,* 368 NLRB No. 10, slip op. at 5 (2019) (explaining the Board's post-*Boeing* approach to analyzing allegations that a mandatory arbitration agreement unlawfully restricts access to the Board).